Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *F. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 443

Tribunal File Number: AD-17-113

BETWEEN:

F. C.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: August 31, 2017

REASONS AND DECISION

DECISION

[1] Leave to appeal is refused.

INTRODUCTION

[2] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated November 5, 2016. The General Division had previously conducted an in-person hearing and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because his disability was not "severe" during the minimum qualifying period (MQP), which ended on December 31, 2009.

[3] On February 7, 2017, within the specified time limitation, the Applicant's legal representative filed an incomplete application for leave to appeal with the Tribunal's Appeal Division. Following a request for further information, the Applicant perfected his application for leave to appeal on February 22, 2017.

THE LAW

Department of Employment and Social Development Act

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal.

[5] According to subsection 58(1) of the DESDA, the only grounds of appeal are the following:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[6] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[7] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[8] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove the case.

Canada Pension Plan

[9] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

[10] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[11] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if they are incapable

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No 1252 (QL).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

ISSUE

[12] The Appeal Division must decide whether this appeal has a reasonable chance of success.

SUBMISSIONS

[13] In his application requesting leave to appeal, the Applicant's representative made the following submissions:

(a) The General Division erred in fact and law by failing to assess the "severity" of the Applicant's impairments in compliance with the legislative requirements. Specifically, the General Division failed to consider the following items of medical evidence:

- a CT scan of the lumbosacral spine dated October 7, 2009, which showed significant degenerative disc disease at L5-S1;
- a CT scan of the lumbosacral spine dated August 20, 2014, which showed annular bulging at L4-L5 and moderate disc narrowing at L5-S1;
- a report from Dr. Greensmith dated June 3, 2013, which said that the Applicant is unable to lift heavy loads and is never completely pain-free; and
- a report from Dr. Greensmith dated September 30, 2016, which found that the Applicant's chronic pain is permanent, and that he is not employable for any form of manual labour.

(b) The General Division erred in law by failing to assess the Applicant's subjective pain levels, as required by the Supreme Court of Canada in *Nova Scotia v. Martin*,[3] which held that, "[d]espite this lack of objective findings, there is no

[3] *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, 2003 SCC 54.

doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real." Instead, the General Division rendered its decision solely on the basis of the Applicant's organic injury, ignoring his testimony about his chronic pain disorder (CPD).

(c) In paragraph 42 of its decision, the General Division misapprehended the law when it stated that it was bound by decisions of Pension Appeals Board (PAB), the Appeal Division's predecessor.

(d) The General Division erred in law by failing to apply the principles of *Inclima v. Canada*[4] and consider the Applicant's serious, although ultimately unsuccessful, attempts to maintain employment. His post-MQP attempts to work should not disqualify him for CPP disability benefits—quite the opposite; he should be commended. In fact, as the General Division noted, had he not made such a significant effort to return to work, he would have been penalized.

ANALYSIS

[14] It must be noted that many of the Applicant's submissions recapitulate evidence and arguments that, from what I can gather, were already presented to the General Division. Unfortunately, the Appeal Division has no mandate to rehear disability claims on their merits. While applicants are not required to prove the grounds of appeal at the leave to appeal stage, they must set out some rational basis for their submissions that falls into the grounds of appeal enumerated in subsection 58(1) of the DESDA. It is not sufficient for an applicant to merely state their disagreement with the General Division, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

Failure to Consider Evidence of Severity

[15] It is an established principle of administrative law that a tribunal is presumed to have considered all the evidence and need not refer to each and every item of evidence before it.[5] Nevertheless, I have reviewed the General Division's decision against the underlying evidentiary record but see no indication that it disregarded material evidence.

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[4] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[5] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[16] The Applicant suggests that the General Division gave inadequate consideration to two CT scans, but both were summarized—in my view, fairly—in paragraph 21 of the decision. In its analysis proper, the General Division specifically found that the October 2009 CT scan, which revealed "moderate" degenerative disc disease, was not suggestive of "severity" of the kinds of functional limitations described by the Applicant.

[17] Inspection of the original indicates that it did in fact describe some aspects of the damage to the Applicant's lumbar spine as "moderate" and, although it later characterized his degenerative disc disease as "significant," this word is not synonymous with "severe." The DESDA permits the General Division to draw inferences from the evidence, so long as it does so within the parameters of paragraph 58(1)(*c*). I do not see how the Applicant would have a reasonable chance of success on appeal in arguing that the General Division's interpretation of this CT scan was perverse, capricious or without regard for the record. As for the August 2014 CT scan, the General Division assigned it limited weight because it was generated more than four years after the MQP. In my view, this was a defensible approach to take with this particular item of evidence.

[18] Much the same can be said for the General Division's treatment of Dr. Greensmith's evidence. The family physician's June 2013 report was referenced in paragraph 11 and accurately summarized in paragraph 22. The General Division made no reference to Dr. Greensmith's September 2016 letter, but it does not appear that this report was ever submitted to the Tribunal, and I therefore have no mandate as an Appeal Division member to consider its merits.

Assessment of Chronic Pain

[19] The Applicant submits that the General Division failed to assess his claims of chronic pain in accordance with the precepts of *Martin*, but I do not see an arguable case on this point.

[20] The Applicant is correct to note that chronic pain has been recognized as a real and potentially debilitating condition by medicine and the law alike, but merely claiming long-standing, subjectively felt pain is not necessarily decisive in disability claims, particularly where there may be other relevant considerations. There is no doubt that the Applicant has long complained of pain symptoms in his lower back and, in that sense, it is indeed "chronic."

However, I saw nothing in the General Division's decision to indicate that it ignored or discounted the longevity of that pain or the Applicant's perception of its intensity:

> [32] … The findings of 2014 possibly reflect the Appellant's testimony that his pain has become worse in recent years (although that is hard to understand since his pain level in 2009 was 8/10)…
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> [33] … While it is noted he has had complaints of back pain for many years, he has been controlled with medication, and according to this record of earnings [June 2016], his own reports, and his family physician's office notes, he returned to work in January 2011, managing his pain effectively with medications…
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> [39] The Appellant relies on subjective evidence to persuade the Tribunal of his disability. The very nature and credibility of subjective evidence can outweigh the absence of any objective clinical medical evidence (*Smallwood v. MHRD* (July 1999), CP 9274, PAB and *MHRD v. Chase* (November 1998), CP 6540, PAB). This is not such a case. The Tribunal did not find the Appellant's evidence sufficiently compelling to overcome the lack of medical information in this appeal. There was no evidence of his condition impacting his ADL and thus work capacity. While it is true that there is evidence of an organic basis for the back pain being experienced by the Appellant, the fact that he has been able to work through this pain and received relief from medications does not assist him.

[21] As indicated in these passages, the General Division considered the Applicant's subjective evidence about his long-standing back pain but based its decision on what it found were more important factors: the relative dearth of medical evidence before December 31, 2009, and evidence of the Applicant's functionality after that date, in particular, his return to work in 2011 and 2012 for what the General Division found were substantially gainful earnings. In my view, the General Division's decision to give precedence to these factors over the Applicant's subjective evidence about his chronic pain was founded in reason and did not qualify as an error of law or fact.

Binding Authority of PAB Cases

[22] The Applicant correctly notes that the General Division should not consider itself bound by decisions of the now-defunct PAB, but that does not appear to have happened in this case. In paragraph 42 of its decision, the General Division wrote, "This Tribunal adopts the reasons of the Miller decision which is binding on this Tribunal." Contrary to Application's allegation,

however, *Miller v. Canada*,[6] is a decision of the Federal Court of Appeal (FCA), which endorsed an earlier decision of the PAB. It is true that the General Division quoted directly from the PAB decision, but that same quote was also cited, with apparent approval, by the FCA, whose decisions do carry the force of authority.

[23] Earlier, in paragraph 39, the General Division cited two other PAB cases[7] in support of the proposition that it is possible for subjective evidence to outweigh the absence of objective medical evidence. I will note that: (i) the General Division never claimed to be bound by these PAB cases, which nonetheless have persuasive value; (ii) they stand for valid law that has been upheld and promulgated by the Courts; and (iii) they correspond to what I presume is the Applicant's position, even if the General Division raised them only to draw a contrast with his circumstances.

[24] I do not see a reasonable chance of success on appeal for this ground.

Post-MQP Effort to Work

[25] The Applicant alleges that the General Division mischaracterized a laudable, but ultimately unsuccessful, attempt to return to work as evidence of capacity.

[26] I have reviewed the Applicant's submissions against the record but see no reasonable chance of success on appeal. As the Applicant notes, the issue is whether his work during 2011– 12 for Mason Landscapers was evidence of capacity or incapacity according to the principle set out in by the Federal Court of Appeal in *Inclima*:

> […] an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

Put another way, if an applicant has stopped working for reasons other than his or her health condition or has failed to investigate alternative work options, the General Division may be

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[6] *Miller v. Attorney General of Canada*, 2007 FCA 237.
[7] *Smallwood v. MHRD* (July 1999), CP 9274, PAB and *MHRD v. Chase* (November 1998), CP 6540, PAB.

justified in drawing an adverse inference. While the General Division cited the above passage in its decision, I acknowledge that merely citing *Inclima* is insufficient. There must also be some indication that the General Division correctly applied facts to principle. The question here is whether the General Division disregarded evidence that the Applicant's 2011–12 earnings stemmed from a failed work trial. In its decision, the General Division took note of the Applicant's testimony about his most recent job:

> [15] … In the fall of 2011, he got a job with Mason Landscapers but was laid off in November. He said he needed enough hours so as to qualify for EI. In the spring of 2012, he went back to Mason and was laid off in August because of an altercation with a fellow employee. He did testify that his boss was willing to let him work within his limitations but was concerned with his mood swings and anger issues. He did not explain why his doctor noted on September 4, 2012 that he was still working cutting grass. However, his application stated that his last work was October 15, 2012 (laid off). There was no explanation for these discrepancies.
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> [16] He did clearly state that he could not return to Masons because of mental issues but could do the work if he was accommodated. In 2009, when he was working, he would miss about 4 days of work per month because of his limitations. He testified that since that job he has been constantly looking for work that would be within his limitations. To do this he uses the internet, newspapers, networking and talking informally with people in restaurants who might offer him a job. His last job search was two months before the hearing.

[27] These passages indicate that the General Division was cognizant of the Applicant's evidence that his landscaping job ended for reasons other than just his physical impairments. Later, in its analysis proper, the General Division found that the Applicant had not discharged his obligation to investigate alternative work that might have been better suited to his medical condition:

> [37] … To his credit this Appellant, on his own testimony, did just that in a vigorous way and found work both before and well after his MQP. He clearly demonstrated that he has been capable regularly of seeking gainful employment after his MQP.
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> [38] The Tribunal finds the Appellant's testimony to be straightforward and given in a direct manner. However it is not wholly consistent with the medical evidence. There is no report factually determining that the disability complained of has produced symptoms that are the major cause of or wholly prevents the Appellant from being able regularly to seek suitable employment in a similar or more sedentary position or in another field that the evidence suggest that the he had reasonable transferable skills to do as of his MQP. There is no evidence that he lost his job because he was incapable of working when he was laid off his last job at Mason's. There is no supporting evidence or opinion from a medical

> source or evidence from a functional abilities assessment that would lead to this conclusion. There is no mental health report that supports the only apparent reason why he was laid off in August 2012 (if that is the correct date).

[28] The General Division was within its authority to weigh the evidence and make findings, within the confines of the law, on the nature of the Applicant's last employment. In this case, having conducted what appears to be a reasonably thorough survey of the material before it, the General Division found that, while the Applicant suffered from back pain, he did have some residual functionality that warranted an *Inclima* inquiry. The decision indicates that the General Division gave adequate consideration to the available evidence in arriving at the conclusion that the Applicant's earnings in 2011 and 2012 were substantially gainful and that his efforts to find alternative employment were insufficient.

[29] In short, the Applicant has not made out an arguable case that the General Division erred in law or that it relied on an erroneous finding of fact.

CONCLUSION

[30] The Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success. Thus, the application for leave to appeal is refused.

Member, Appeal Division